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Supreme Court, U.S.
FILED
JAN 22 1997
CLERK

No.96-1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN RE: THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Petitioner.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Brief In Opposition To Writ of Certiorari

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QUESTION PRESENTED

Whether the lower court properly held that the petitioner, a member of the press, had no First Amendment right of access to a private and non-public settlement negotiation proceeding known as a "summary jury trial".

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Brief In Opposition To Writ of Certiorari

Respondents, Plaintiffs' Class Morris, et al., oppose the Petition for a Writ of Certiorari.[1]

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[1] Respondents have no Rule 29.1 parent companies or subsidiaries.

SUMMARY OF REASONS FOR DENYING THE WRIT

No compelling reason exists to grant the petition for a writ of certiorari. The decision of the Court of Appeals for the Sixth Circuit denying the respondent, a member of the press, access to a private, non-public settlement negotiation procedure is not in conflict with relevant decisions of the United States Supreme Court or of another United States Court of Appeals. Petitioner's argument that denial of access violated its First Amendment right of access to civil jury trials is meritless. Further, the facts underlying this petition are so particular to this matter that the case is not suitable for review by the Supreme Court, to wit: the parties to a class action litigation pending in the Southern District of Ohio, Western Division, elected to proceed with a confidential settlement negotiation technique in order to attempt to resolve specific issues of disagreement which had proven to be obstacles to a negotiated resolution of the litigation; and confidentiality was requested by the State of Ohio and agreed to by the plaintiffs' class to accomodate the State of Ohio's legitimate concern that public access to the settlement procedure could prove disruptive to the operations of Ohio's 28 correctional institutions, housing 45,000 inmates and, in particular, the Southern Ohio Correctional Facility, which is Ohio's maximum security prison and the location of the inmate riot that is the subject matter of the litigation.

REASONS FOR DENYING THE WRIT

I. THE FIRST AMENDMENT RIGHT OF ACCESS DOES NOT ATTACH TO SETTLEMENT NEGOTIATION PROCEDURES.

In accordance with its prior decision rendered in Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d 900 (6th Cir. 1988), cert. denied, 489 U.S. 1003 (1989), the Court of Appeals for the Sixth Circuit ruled in the instant matter that the First Amendment right of access did not attach to the summary jury trial which was proceeding before the lower court as a private, non-public settlement negotiation procedure.

In so deciding, the Court of Appeals properly analyzed the issue of whether petitioner should be accorded a First Amendment right of access, by applying the two-step review process set forth in Press-Enterprises Co. v. Superior Court, 106 S.Ct. 2735 (1986). The issues addressed were whether the proceeding was one for which there has been a "tradition of accessibility", and whether access "plays a significant positive role in the functioning of the particular process in question." Press-Enterprises Co. v. Superior Court, 106 S.Ct. at pp. 2741, 2742. The questions were answered in the negative. First, the Court of Appeals ruled that the summary jury trial proceeding was not in the nature of a court hearing or a jury trial, but was instead essentially a settlement proceeding.[2] Settlement proceedings are historically closed

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[2] A summary jury trial lacks the procedural safeguards that are necessary to fairly adjudicate a claim. In the Southern District of Ohio, Western Division, the attorneys representing the parties present selected, limited evidence using summary formats. There is no live testimony and no cross-examination and thus no testing of credibility. At times, as in the instant matter, not all named defendants participate

procedures. Cincinnati Gas and Electric Co. v. General Electric Co., 854 F.2d at p. 903; Palmieri v. New York, 779 F.2d 861, 865 (2nd Cir. 1985). The proceeding did not present any matter for adjudication by the court, but functioned to facilitate settlement. Then, in accordance with its prior ruling in Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d at p. 904, the Court of Appeals for the Sixth Circuit found that "where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement." In the instant matter, the interest in confidentiality was highly legitimate. The State of Ohio was reasonably concerned that public access to this settlement procedure could prove dangerously disruptive to the operations of Ohio's 28 correctional institutions. In particular, the parties were particularly cognizant of the potential for disruption at the Southern Ohio Correctional Facility, which is Ohio's maximum security facility and the location of the actual inmate riot that was the subject matter of the litigation.

The Court of Appeals did not err in determining that petitioner did not have a First Amendment right of access to the summary jury trial. As such, the petitioner's writ of mandamus was properly denied as "[t]he remedy is to be

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in the summary jury trial. The procedure used is extremely similar to that used in mock jury trials often undertaken privately by a party to a litigation prior to trial in order to determine strengths and weaknesses of a case. The summary jury trial procedure also deals only with selected issues central to meaningful settlement discussions. Many issues and claims, for the sake of simplicity, are deleted in the summary proceeding. The jury answers special interrogatories in lieu of issuing an actual verdict, many of which are drafted to be advisory in nature. The jury is also asked to award damages even in the absence of liability. The results are non-binding.

invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993); In re Gillis, 836 F.2d 1001, 1012 (6th Cir. 1988); In re Bendectin Prods. Liability Litig., 749 F.2d 300, 303 (6th Cir. 1984). Petitioners failed to show such an indisputable right of access.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated January 22, 1997